

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an application in terms of Article
126 of the Constitution of the Democratic Socialist
Republic of Sri Lanka.

SC (FR) No. 297/2008

1. Sumanasiri G. Liyanage
12/21, Circular Road,
Hantane, Kandy.
2. Hettiarachchige Subash Ravi Jayawardana
No. 155/4, Dolalanda Gardens,
Thalawathugoda.

Petitioners

Vs.

1. H.E. Mahinda Rajapakse
President of Sri Lanka,
Temple Trees, Colombo 3.
2. W.J.M. Lokubandara,
Speaker of the Parliament of Sri Lanka
Parliament Complex,
Sri Jayawardenapura, Kotte.
- 2A. Hon. Chamal Rajapakse
Speaker of the Parliament of Sri Lanka
Parliament Complex,
Sri Jayawardenapura, Kotte.
3. Lalith Weeratunga
Secretary to the President of Sri Lanka
Presidential Secretariat,
Colombo 01.
4. The Attorney General,
Attorney General's Department, Colombo 12.

5. Ratnasiri Wickremanayake
Prime Minister of Sri Lanka
Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha,
Colombo 07.

5A. D.M. Jayaratme
Prime Minister of Sri Lanka
Prime Minister's Office,
No. 58, Sir Earnest de Silva Mawatha,
Colombo 07.

6. Ranil Wickremasinghe
Leader of the Opposition
30, Sir Marcus Fernando Mawatha,
Colombo 07

Respondents

SC (FR) No. 578/2008

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Centre for Policy Alternatives (Guarantee) Ltd.,
No. 24/2, 28th Lane, Off Flower Road,
Colombo 7.
2. Rohan Edirisingha.
No. 24/2, 28th Lane, Off Flower Road,
Colombo 7.

Petitioners

Vs.

1. Hon. Attorney General
Attorney General's Department,
Hulftsdorp, Colombo 12.

2. H.E. Mahinda Rajapakse
President of the Democratic Socialist Republic
of Sri Lanka,
Temple Trees, 150,
Galle Road, Colombo 3.
3. Lalith Weeratunga
Secretary to the President of the Democratic
Socialist Republic of Sri Lanka,
Temple Trees, 150,
Galle Road, Colombo 03.
4. Mohan Peiris,
President's Counsel,
3/144, Kynsey Road,
Colombo 08.

Respondents.

BEFORE : J.A.N. De Silva CJ.
P.A. Ratnayake, J. &
Ekanayake, J.

COUNSEL :

SC.(FR) Application No. 297/08 -

M.A. Sumanthiran with Viran Corea, Suren Fernando and E.
Tegal for Petitioners.

N. Pulle, SSC. for 2nd - 5th Respondents.

A.P. Niles for 6th Respondent

SC.(FR) Application No. 578/08 -

M.A. Sumanthiran with Viran Corea, Suren Fernando and E.
Tegal for Petitioners

Sanjeewa Jayawardene with Senany Dayaratne for 4th Respondent

N. Pulle, SSC. for the Attorney General

ARGUED ON : 12-11--2010

DECIDED ON : 18 – 3 - 2011

J.A.N. De Silva, CJ.

S.C. (FR) Applications 297/08 and 578/08 were taken up together with the agreement of parties as the main issues to be decided were similar. S.C. (FR) 297/08 dealt with alleged acts or omissions committed by H.E. the President who is cited as the 1st Respondent with regard to the non appointment of the Constitutional Council in terms of the former Article 41A of the Constitution and SC. (FR) 578/08 dealt with the appointment of the 4th Respondent as Attorney General of Sri Lanka in the said case by H.E. the President who is cited as the 2nd Respondent allegedly without following the procedure laid down and without obtaining the approval of the Constitutional Council in terms of the former Article 41C of the Constitution.

Prior to the objections being filed by the Respondents, both applications were taken up for argument based on preliminary objections raised on behalf of the Respondents regarding the maintainability of both applications due to the Provisions contained in Article 35 of the Constitution.

Applications were taken up on 12.11.2010 for hearing. All parties made oral submissions and have also filed extensive written submissions on the preliminary objections.

During the period of the filing of these applications and the date of hearing on the preliminary objections, Article 41 of the Constitution has been amended and the

Constitutional Council is no longer in existence. In that context the Counsel for the Petitioners in both applications sought to make submissions on the constitutionality of the amendments made to Article 41 of the Constitution. The amendment to Article 41 was challenged in this Court under Article 121 of the Constitution and a five member Bench of this Court has already made a determination on the constitutionality of the said amendment and the bill has become law in terms of Article 80(1) of the Constitution. Accordingly this Court will not have jurisdiction to consider the validity of the said law due to the express provisions of Article 80(3) of the Constitution.

The Petitioner in application SC. (FR) 297/08 has prayed for the following reliefs:-

- "(a) Leave to proceed with this application;
- (b) A declaration that the action(s) complained of herein constitute an imminent infringement of the fundamental rights of the Petitioner guaranteed by 12(1) of the Constitution;
- (c) A declaration that the action(s) complained of herein constitute an infringement of the fundamental rights of the Petitioner guaranteed by 12(1) of the Constitution;
- (d) (i) A direction on the 1st Respondent to make appointments to the Constitutional Council as mandated in terms of Article 41A(1) (e) of the Constitution, *or in the alternative*;
- (ii) A declaration that the 1st Respondent is required to make appointments to the Constitutional Council as mandated in terms of Article 41A(1)(e) of the Constitution, *or in the alternative*;
- (iii) A direction on the 3rd Respondent to communicate to the 1st Respondent that once the nominations have been communicated to the 1st Respondent by the 2nd Respondent (the Speaker of Parliament), the Constitution mandates the making of appointments to the Constitutional Council;
- (iv) An order for Costs; and
- (v) An order for such other and further reliefs as to Your Lordships' Court shall seem meet.

The Petitioner in application SC. (FR) 578/08 has prayed for the following reliefs:-

- " (a) Grant the Petitioners leave to proceed with this Application;
- (b) Make an Interim Order restraining the 2nd Respondent from appointing the 4th Respondent or any other person to fill the position/office of Attorney General of Sri Lanka and/or restraining the 4th Respondent from taking oaths as the Attorney General of Sri Lanka until the final hearing and determination of this Application and/or until the approval of a duly constituted Constitutional Council in respect of such appointment is first duly sought and obtained;
- (c) Make an Interim Order staying the operation of and/or giving effect to any permanent appointment made, of the 4th Respondent or any other person, as the Attorney General of Sri Lanka, until the hearing and final determination of this Application;
- (d) Make an Interim Order that the holder of the office of Learned Solicitor General shall continue to discharge the functions of Hon. Attorney General on an Acting basis, until the hearing and final determination of this Application and/or until the approval of a duly constituted Constitutional Council in respect of a permanent appointment is first duly sought and obtained;
- (e) Make an Interim Order preventing the 4th Respondent from functioning as the Attorney General of Sri Lanka until the hearing and final determination of this Application unless the approval of a duly constituted Constitutional Council in respect of such appointment is first duly sought and obtained;
- (f) Declare that the taking of steps to appoint the 4th Respondent or any other person as the Attorney General of Sri Lanka (without the approval of the Constitutional Council in respect of same having being first sought and obtained) constitutes imminent infringement of the fundamental rights of the Petitioners and the People of Sri Lanka guaranteed under Article 12(1) of the Constitution;
- (g) Declare that any appointment of the 4th Respondent or any other person as the Attorney general of Sri Lanka (without the approval of the Constitutional Council in respect of same having being first sought and obtained) constitutes present and continuous infringement and involve imminent further infringement of the fundamental rights of the Petitioners and the People of Sri Lanka guaranteed under Article 12(1) of the Constitution;
- (h) Declare that any appointment of the 4th Respondent or any other person as the Attorney General of Sri Lanka (without the approval of the

Constitutional Council in respect of same having being first sought and obtained) is *ultra vires*, a nullity and/or void and of no force, avail or effect law;

- (i) Direct the 3rd Respondent Secretary to the President, to bring the directions and declarations made by Your Lordships' Court, to the notice of the 2nd Respondent President of Sri Lanka, as appropriate;
- (j) Grant Costs; and
- (k) Grant such further and other relief(s) as to Your Lordships' Court shall seem meet."

Due to the Constitutional Council not being in existence it would be futile to grant most of the reliefs prayed for in the above two applications.

In the written submissions dated 18th September 2008 the following preliminary objections were taken by the Hon. Attorney General in S.C. Application No. 297/08;

- "(a) That the Petitioners cannot have and maintain these proceedings in view of the specific provisions contained in Article 35(1) of the Constitution, which confers **immunity from suit** on the President **in respect of anything done or omitted to be done** by him in his official or private capacity.
- (b) That the Petitioners cannot have and maintain these proceedings in view of the specific provisions contained in **Article 35(3) of the Constitution**, which **exhausts the instances in which proceedings may be instituted against the Attorney General.**
- (c) That the **17th Amendment to the Constitution**, which has **not resulted in any erosion of the inalienable executive power of the President** and accordingly, the constitution of the **Constitutional Council**, provided for in terms of the specific provisions of the said 17th Amendment to the Constitution, should be construed as **a directory requirement**, in order to ensure **an interpretation consistent with Article 3 read with Article 4(b) of the Constitution.**
- (d) That in any event, the **President who is the sole repository of the inalienable executive power**, should not be compelled to constitute the Constitutional Council, **"forthwith"** in view of the specific provisions of the **17th Amendment to the Constitution**, which **vests discretion in the President, to satisfy himself**, that the criteria contained in the Constitution,

pertaining to nominations, has been adhered, prior to the appointment of the said persons and furthermore in view the pending deliberations of the Parliamentary Select Committee appointed with regard to implementation of the 17th Amendment to the Constitution, which the President may be required to give due consideration, in view of responsibility of the President to Parliament, in terms of Article 42 of the Constitution.

(e) Necessary parties not before Court."

Identical objections in terms of paragraphs (a) and (b) above were taken on behalf of the 4th Respondent in SC. Application 578/08.

I will deal with the first two objections which deal with Article 35 of the Constitution as submissions of all Counsel were mainly focused on the said two objections. In any event due to the amendment of Article 41 of the Constitution resulting in the Constitutional Council no longer being in existence and the fact that a decision in favour of the Respondents in respect of the first two objections could conclude these applications also merit the consideration of these two objections at the commencement.

Article 35 of the Constitution states as follows:-

- "35(1) "While any person holds office as President, no proceedings shall be instituted or continued against him in any court or tribunal in respect of anything done or omitted to be done by him in his official or private capacity
- (2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law
- (3) The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44 or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) [relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament]

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney - General."

In application SC. (FR) 297/08 the 1st Respondent is cited as follows:- "H.E. Mahinda Rajapakse, President of Sri Lanka, Temple Trees, Colombo 03." As mentioned at the commencement this application deals with the alleged acts or omissions committed by H.E. the President with regard to the non appointment of the Constitutional Council in terms of the former Article 41A of the Constitution.

In application SC. (FR) 578/08 the 2nd Respondent is cited as follows:- "H.E. Mahinda Rajapakse, President of the Democratic Socialist Republic of Sri Lanka, Temple Trees, 150, Galle Road, Colombo 03." It deals with the appointment of the 4th Respondent as the Attorney General of Sri Lanka by H.E. the President allegedly without following the procedure laid down and obtaining the approval of the Constitutional Council in terms of the former Article 41(c) of the Constitution.

The applications do not deal with situations falling within Article 35(3) of the Constitution where the President was performing functions or exercising power in the capacity of a Minister in respect of a subject or function assigned to himself under Article 44 (2) of the Constitution. The matters challenged in both applications expressly deal with matters where the President was performing functions or exercising power in the capacity of President. It is clear that the applications also do not come within the other provisions referred to in Article 35(3).

In response to the preliminary objections (a) and (b) taken by the Attorney General in his written submissions dated 18th September 2008 the Petitioners by their written submissions filed with their motion dated 5th June 2009 has contended in paragraphs 6,7,8,10,11,12,13,14 and 15 as follows:-

" (6) It is respectfully submitted that Article 35(1) does not provide that the immunity conferred by the said Article is "subject to the provisions of the Constitution".

- (7) Notwithstanding the absence of such a provision, it is material to note that Article 38 of the Constitution (which provides for the vacation of the office of President) also provides for the removal of the President from office (Article 38 (1)(e), during which process an inquiry and report by the Supreme Court may be necessitated (Article 38(2)(c),(d) and (e)).
- (8) Accordingly it is manifest that the immunity conferred by Article 35(1) was not intended (even during the President's tenure of office) to be absolute, and in situations where the *intentional violation of the Constitution* is involved (see for example Article 38(2)(a)(i)) the Constitution recognizes that the jurisdiction of Your Lordships' Court may be invoked (albeit that the said Article provides a separate mechanism for such invocation).
- (10) In any event, without prejudice to the aforesaid contention, it is also respectfully submitted that it is manifest that Article 35(1) only confers limited immunity on the President (the Actor) and NOT on the acts/omissions themselves.
- (11) This is borne out by the very wording of Article 35(1) which provides that;
*While any person holds office as President, **no proceedings shall be instituted or continued against him** in any court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity.*
- (12) The Article does not prohibit (in any circumstance) proceedings being instituted or continued against **his acts**. It is respectfully submitted that any other interpretation would do violence to the principle of interpretation that rights must be broadly construed, and limitations/ exceptions to such rights narrowly construed.
- (13) The jurisprudence of Your Lordships' Court has recognised that the acts of the President can be challenged:

*' In accordance with those principles, **this Court has reviewed the acts** of the entire Cabinet of Ministers **inclusive of the President** (Ramupillai v. Festus Perera, (5); Perera et al. v Pathitrana) SC 453/97 SCM 30.1.2003), and of the President Wickremabandu v Herath; Karunatileke v Dissanayake ,(7)**despite Article 35** which **only provides a shield of personal immunity** from proceedings in courts and tribunals, **leaving the impugned acts themselves open to judicial review.**'"*

Senasinghe V. Karunatileke , Senior Superintendent of Police, Nugegoda And Others 2003 1 SLR at page 172

"I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar

*whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time. That is a consequence of the very nature of immunity; **immunity is a shield for the doer, not for the act.** Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court"*

Karunathilaka and another v Dayananda Dissanayake, Commissioner of Elections and others (4) 2003 1 SLR at page 177.

- (14) Accordingly, the omissions of the President can also be the subject of proceedings before Your Lordships' Court.
- (15) Therefore it is respectfully reiterated that, whatever the position as to the immunity of the actor, the acts/ omissions themselves would clearly be justiciable before Your Lordships' Court. "

In dealing with the objections the Provisions of Article 42 of the Constitution should be considered.

"The President shall be responsible to Parliament for the due exercise, performance and discharge of his powers, duties and functions under the Constitution and any written law, including the law for the time being relating to public security."

Accordingly the President is made responsible to the Parliament in respect of the conduct of his official functions and Article 38 (2)(a) quoted by the Petitioner himself actually deals with the Provisions which expressly enable the Parliament to take action in similar situations where it is stated as follows:-

Article 38(2)(a)

"Any Member of Parliament may, by a writing addressed to the Speaker, give notice of a resolution alleging that the President is permanently incapable of discharging the functions of his office by reason of mental or physical infirmity or that the President has been guilty of-

- (i) intentional violation of the Constitution,
- (ii) treason,
- (iii) bribery,

- (iv) misconduct or corruption involving the abuse of the powers of his office, or
- (v) any offence under any law, involving moral turpitude, and setting out full particulars of the allegation or allegations made and seeking an inquiry and report thereon by the Supreme Court. "

Accordingly the Constitution expressly provides a procedure to deal with what the Petitioners describe as "intentional violation of the Constitution". In the said context I do not see any basis for the submission advanced on behalf of the Petitioners under paragraph 7 and 8 of the written submissions, referred to above.

In support of the position taken in paragraphs 10 to 15 of the written submissions referred to above, Counsel for the Petitioners also made extensive submissions based on cases decided by this Court on the principle that the acts of the President does not attract immunity under Article 35 of the Constitution. He referred to the case of ***Senasinghe V. Karunatilleke, Senior Superintendent of Police, Nugegoda And Others 2003 1 SLR at page 172*** . He made specific reference to the statement made by this Court in ***Karunathilaka and another v. Dayananda Dissanayake, Commissioner of Elections and others (4) 2003 1 SLR at page 177***, that "immunity is a shield for the doer and not for the Act"

It appears that the submissions do not deal with the objections raised by the Respondents which are focused on the "doer" and not the "Act". The immunity is claimed by the Respondents to the "doer" and not for the "Act".

Karunatilleke & another vs. Dissanayake (supra) is a case where the President was not cited as a party and the Commissioner of Elections who was the Respondent relied on the regulations made under a Presidential Proclamation. It is not the Act of the President that was challenged but the act of the Commissioner of Elections who was a Respondent.

It should also be noted that in the judgment Fernando,J. expressly holds as follows:-

" I hold that Article 35 only prohibits the Institution (or continuation) of legal proceedings against the President while in office.;" (Karunatilleke & another vs. Dissanayake (supra) ,page 177) .

Accordingly he has upheld the position that legal proceedings cannot be instituted against the President while in Office.

The basic objection of the Respondents appear to be that the President has been made a party in both applications and that Article 35 expressly prohibit the President being made a party in similar proceedings, whilst holding office as President, except in respect of instances referred to in Article 35 (3), and the impugned actions of the President in the two applications do not fall within Article 35(3). It is not on the question whether the acts or omissions of the President enjoys immunity or not. In the circumstances, I do not see much relevance in the submissions made under the headings falling within paragraphs 10-15 of the Petitioner's written submissions referred to above which are focused mainly on the question whether the acts or omissions of the President enjoy immunity.

At this stage I would like to deal with the nature of the immunity granted under Article 35 of the Constitution as the Petitioners at various stages of their submissions have made an effort to demonstrate that the immunity given to the President under this provision is not absolute.

Article 35 of the Constitution confers immunity on the President from having proceedings instituted or continued against him in any Court in respect of anything done or omitted to be done in his official or private capacity except in respect of matters specified in Article 35 (3) of the Constitution. The language used in the Article is plain and unambiguous. In *Kumarathunga vs. Jayakody* 1985 2 SLR 124 at page 135 Sharvananda CJ. interpreting a Constitutional provision states as follows:-

"Where the language of the Constution is plain and unambiguous, effect has to be given to it and a Court cannot cut down the scope or amplitude of such provision for the reason that notionally it cannot harmonise with the ideal of the Constitution. "

Bindra observes that "where the words of the statute are clear enough, it is not for the Courts to 'travel beyond the permissible limits' under the doctrine of implementing legislative intention." (N.S. Bindra Interpretation of Statutes -9th Edition page 401).

In fact in Victor Ivan vs. Hon. Sarath N Silva 2001 1 SLR 309 at 327, where an effort was made to challenge the absolute nature of the immunity granted by Article 35, this Court in a five Bench decision where it was refused to even grant Leave to Proceed S.W.B. Wadugodapitiya, J stated as follows:-

"I am constrained to say that in fact what the Petitioners are asking this Court to do, is in effect to amend, by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This of Course, is not within the power of this Court to do. In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the legislature especially where the Constitution itself is concerned. "

This Court in the case of Mallikarachchi vs. Siva Pasupathi, Attotrney General 1985 1 SLR 74 at 77 makes the following observations in respect of the immunity granted to the President under Article 35(1) of the Constitution;

"Article 35(1) confers on the President during his tenure of Office an absolute immunity in legal proceedings in regard to his official acts or omissions and also in respect of acts or omissions in his private capacity. The object of this article is to protect from harassment the person holding the high Office of the executive head of State in regard to acts or omissions either in his official or private capacity during his tenure of the office of President."

In the circumstances mentioned above, Article 35 of the Constitution do not permit the President to be cited as a Respondent in SC. (FR) Application 297/08 or in SC. (FR) application 578/08. Since the impugned acts or omissions in the applications do not fall within Article 35(3) it is not possible to cite the Attorney General as a Respondent under the proviso to Article 35(3). Based on the above facts both applications have been wrongly constituted and therefore fails in limine. Since the two objections considered and taken by the Hon. Attorney General and Counsel appearing for the 4th Respondent in SC. (FR) application 578/08 are fatal to the maintainability of both applications, it is not necessary to decide on the other questions raised on behalf of the Petitioners.

SC. (FR) Application 297/08 and SC. (FR) application 578/08 are dismissed. In all the circumstances of these two applications, there will be no costs.

Chief Justice

P.A. Ratnayake, J.

I agree

Judge of the Supreme Court

Ekanayake, J.

I agree

Judge of the Supreme Court